June 2, 2004

BY HAND

Mr. Lawrence H. Norton
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUP – America Coming Together, Ellen Malcolm and Andrew Grossman

Dear Mr. Norton:

On behalf of America Coming Together ("ACT"), Ellen Malcolm and Andrew Grossman,[1] this letter is submitted in response to the complaint filed by Bush-Cheney '04, Inc. and the Republican National Committee.

For the reasons set forth below, the Federal Election Commission should find no reason to believe that any of these respondents has violated the Federal Election Campaign Act of 1971, as amended ("FECA"), or the Commission's regulations, and it should dismiss this matter. In essence, the complainants are seeking in an enforcement proceeding to establish and secure relief both upon novel interpretations of FECA, including some that the Commission itself, at its public meeting on May 13, 2004, refused in three votes to embrace in new regulations, and upon patent mischaracterizations of the applicable regulations

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combined with pure speculation. Neither provides a legitimate predicate for a reason-to-believe determination and a consequent investigation.

Indeed, in the wake of the Commission's May 13 meeting, the complainants themselves appear to have retreated from their own legal theories, issuing a joint press release that, amidst a heated (and, we submit, wholly disingenuous) attack on the Commission's votes, acknowledged their view that various conservative or Republican-leaning groups "now know that they can legally engage in the same way Democrat leaning groups like ACT, MoveOn have been engaging." See WWW.GOP.COM. We only echo the candor of some Republican partisans in noting the hypocrisy and purely tactical political game-playing underlying this complaint, see, *e.g.*, Hearing on the Federal Election Commission, House Committee on Administration, Transcript at 3 (May 20, 2004) ("House Admin. Transcript") (comments of Rep. Ney), which was filed on March 31 in tandem with a press conference and a widely circulated powerpoint stressing Watergate comparisons and terms like "massive conspiracy" – hot rhetoric lacking any credible support in the news stories and other public documents that comprise the complainants' "evidence." If the Commission opens an investigation on this basis, it will place itself at the mercy of partisans from all quarters ever eager to use it as an instrument to harass and intimidate their adversaries.

I. ACT is Operating Lawfully Under FECA in Allocating Between Its Federal and Non-Federal Accounts

ACT is an unincorporated organization that operates and is registered with the FEC as a political committee and conducts its activities in compliance with the relevant current and binding FEC regulations. ACT is a non-connected committee within the meaning of 11 CFR § 106.6(a); it is not a party committee, a separate segregated fund or an authorized committee of a candidate. ACT also raises and spends funds, including corporate and union funds, and individual funds raised without regard to the Act's dollar limitations, in order to engage in activities that do not constitute "expenditures" or "contributions" under FECA; this account is duly registered with and reports to the Internal Revenue Service with respect to these funds and activities under Sections 527(i) and (j) of the Internal Revenue Code, 26 U.S.C. §§ 527(i) and (j).

In the management of its funds and the conduct of its programs, ACT has established its federal and nonfederal accounts pursuant to 11 CFR § 102.5, and operates those accounts in accordance with 11 CFR § 106.6, which provides that non-connected committees active in both federal and nonfederal elections "shall allocate" between federal and nonfederal accounts the costs of their activities. In a recent advisory opinion, AO 2003-37, *Americans*

for a Better Country, the Commission confirmed that a committee with a federal and a non-federal account may operate in exactly this fashion.[2] Specifically, the Commission stated:

> [P]olitical committees may maintain Federal and non-Federal accounts, 11 CFR 102.5, and may allocate certain payments between Federal funds and non-Federal funds, *see, e.g.*, 11 CFR 106.6(b)(2)(iii) (allocation of expenses for generic voter drives by non-connected political committees).

AO 2003-37 at 5.

Regardless of how this allocation should be calculated (about which more below), the complainants do not present any facts to indicate that ACT has failed to allocate correctly. Rather, in the current environment of uncertainty and controversy surrounding possible revisions of existing rules, they seek to push the Commission to a reason-to-believe finding simply by insinuating possible wrongdoing, and by advancing interpretations of the Act and the regulations that the Commission so far has explicitly rejected or said it plans to consider further in the rulemaking it initiated in March for application to the 2005-06 election cycle. However and whenever the Commission ultimately proceeds, ACT cannot be held in this enforcement proceeding to standards that do not now and may never apply.

The allocation-related violations alleged in the complaint depend upon the complainants' apparent contention (despite its length, the complaint lacks critical specificity) that ACT in its entirety, or almost in its entirety, is a political committee because it is devoted exclusively, or nearly so, to influencing the presidential election, see Complaint at 13-14, and is "using 98 percent soft dollars for the express purpose of defeating a federal candidate in flagrant disregard of Advisory Opinion 2003-37." See *id.* at 46. But, the complaint offers no information about ACT's spending to bolster that speculation, tellingly omitting to include as exhibits ACT's reports to the Commission and the IRS, ignoring ACT's actual spending reflected on those reports, and specifically referring only to ACT's Schedule H2 on its January 31, 2004 report. See *id.* at 22-31. The complaint instead either highly selectively quotes from some ACT materials or relies upon how reporters and others outside of ACT's control have chosen to characterize ACT.

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[2] It bears noting, however, that "Americans for a Better Country" (ABC) has fully borne out suspicions raised at the time of its request that it is a phony organization – its FEC Forms 3X and IRS Forms 8872 through March 31, 2004, show that it has raised absolutely no money.

In fact, ACT has consistently made plain that it has multiple purposes: defeating President George W. Bush; electing progressive candidates to local, state and other federal offices; and mobilizing millions of people to register and vote around critical issues. The complaint recognizes only the first purpose, and attacks ACT's current 2%/98% allocation ratio on the apparent premise that a committee's acknowledgement of a federal purpose *per se* precludes such a ratio. But that is not the applicable law. As a political committee, ACT *can* undertake express advocacy messages and include among its explicit purposes the election or defeat of federal candidates. And, as the Part 106 regulations make plain, a political committee can be connected with a non-federal account that undertakes electoral activities that FECA does *not* regulate, except through Part 106 in establishing the relative allocation of spending by the conjoined federal and non-federal entities.

Moreover, Part 106 provides that an allocation ratio is to be calculated on the basis of "the two-year federal election cycle" by "estimat[ing]" the ratio at the beginning of that cycle and adjusting along the way. See 11 C.F.R. § 106.6(c)(1). ACT first came into existence in July 2003, and had no history upon which to predicate its ratio, so it has proceeded on a "reasonable prediction of its disbursements" for the remainder of this cycle. See *id.*

With respect to the allocation formula itself, for administrative expenses and generic voter drives of an organization comprised of federal and non-federal accounts, "[i]n calculating its federal expenditures, the committee shall include only amounts contributed or otherwise spent on behalf of specific federal candidates." 11 C.F.R. § 106.6(c)(1). Since the Commission's allocation regulations went into effect on January 1, 1991--over 13 years ago--this language (which, until BCRA, also applied to allocation by the national party Senate and House campaign committees, see 11 C.F.R. § 106.5(c)(1)(i) (2002)) was implemented and enforced to mean that the federal share was calculated by the proportion of federal contributions and express advocacy communications regarding federal candidates, as Commissioner Toner explained at the Commission's May 13, 2004 public meeting.[3]

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[3]After the Commission twice voted against the final regulation that he and Commissioner Thomas had proposed in Agenda Doc. No. 04-44, Commissioner Toner moved the adoption of the portion of their proposal concerning the allocation regulations (from page 5, line 5 to the end), explaining that this regulation in part:

> [W]ould codify the ABC advisory opinion in terms of the fact that expenditures for promote, support, attack, oppose communications would count towards the federal share of the funds expended split that committees would operate with...that would then govern their overhead, salary and administrative costs. But that is not the case today which is how basically

BCRA did not disturb this allocation scheme for non-connected committees. BCRA effectively ended allocation by national party committees, and the Supreme Court in *McConnell v. FEC*, 124 S. Ct. 619, 660 (2003), expressed doubt as to the general consistency of their previous allocation practices with FECA. But that stands in sharp contrast to the allocation rules governing *non*-connected committees: BCRA did *not* affect their structures or spending at all. For that reason, whereas the Commission revised its allocation regulations for party committees in its 2002 BCRA-implementation rulemakings, see 11 C.F.R. §§ 106.5 and 106.7; Final Rule, "Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money," 67 Fed. Reg. 49064, 49076-80 (July 29, 2002), it left the allocation regulations applicable to non-connected committees fully intact. See 11 C.F.R. § 106.6; Notice of Proposed Rulemaking ("NPRM"), "Political Committee Status," 69 Fed. Reg. 11736, 11753 (March 11, 2004). Nor is there any doubt that FECA, before or since BCRA, permits non-connected committees to raise and spend non-federal funds.

As Commissioner Thomas recently testified, adoption of the final regulation that he and Commissioner Toner proposed in order to compel that a non-connected committee's account be used for "promote, support, attack or oppose" messages would have ended the current ability of an organization under the Part 106

> organizations working with our existing allocation rules can operate with a 2% federal and 98% soft money split.
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> Our current regulations basically make clear that in terms of developing your split of hard dollars and soft money, it turns on the ratio of federal contributions, you know, contributions to federal candidates as well as express advocacy communications, that's the numerator, the federal side of the equation. And, then on the nonfederal side, you've got contributions to state and local candidates, express advocacy for those candidates as well. So, if you have an organization that gives a $1,000 contribution to a federal candidate, $99,000 of contributions to a nonfederal candidate, otherwise refrains from express advocacy communications for candidates, you achieve a 1% hard dollar, 99% soft money split that could then be used for that organization's activities, salary, overhead, but also generic activities, voter registration, get-out-the-vote drives and that kind of thing, no matter how they're geared and no matter what their focus.

The Commission then voted 3-3 not to approve the proposed regulation. (All references to and quotations from the May 13 public meeting are derived from audiotapes of that meeting provided by the Commission to Perkins Coie LLP at the latter's request.)

regulations to count only federal contributions and express advocacy messages concerning federal candidates in the federal share. Statement of Commissioner Scott E. Thomas before the Committee on House Administration, U.S. House of Representatives 2-3, 6 (May 20, 2004).[4] But the Commission, of course, rejected that proposed rule.

Nonetheless, in AO 2003-37, the Commission in February for the first time ever purported to expand the definition of the established statutory term "expenditure," 2 U.S.C. § 431(9), in order to reach certain communications supposedly to be made by requestor ABC (an organization purportedly comprised of federal and non-federal accounts), namely, communications that "promote, support, attack or oppose...only...clearly identical federal candidates." AO 2003-37, at 3. Reasoning that such messages "are made for the purpose of influencing any federal election," the Commission stated that ABC must pay for them with its federal account. See *id.*

The OGC has since described this aspect of AO 2003-37 as a "substantial reinterpretation" of the allocation rules. See Agenda Doc. No. 04-48 at 7 (May 11, 2004). Indeed, as the General Counsel observed at the May 13 public meeting, AO 2003-37 "looks an awful lot like a regulation." But the Act explicitly precludes the Commission from "initially propos[ing]" any "rule of law" in an advisory opinion rather than in a regulation. See 2 U.S.C. § 437f(b). And, in fact, the "promote, support, attack or oppose" federal-funds

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[4] At the Commission's May 13th public meeting, Commissioner Thomas asserted that ACT was "manipulating the Commission's allocation formula," but he implicitly acknowledged that recourse lay only in changing the regulations. See also Hearing of the House Committee on Administration, May 20, 2004, Transcript at 9 ("The formula can be easily manipulated if only contributions and express advocacy are counted as candidate-specific outlays. For example a group could contribute a dollar to a federal candidate and $99 to a non-federal candidate and avoid express advocacy, and thereafter work with a 1% federal, 99% non-federal ratio for all allocable expenses.") (testimony of Commissioner Thomas). Commissioner Toner stated even more directly:

> And I want to make clear that I don't have any basis for believing that the splits that have been reported for various organizations are inappropriate under our existing regulations. I think they are fully appropriate. There has been discussion about one organization that's operating with a 98% soft dollar split. I think that is probably appropriate under our regulations. I just don't think the regulations themselves are appropriate.

requirement so departs from the regulations and so comprises a general "rule of law" that the Commission could only adopt it, if at all, through a formal rulemaking under 2 U.S.C. § 438(d).[5]

Shortly after issuing AO 2003-37, the Commission implicitly recognized as much, introducing its NPRM that would have added this new allocation requirement, as well as many other new requirements, to the regulations. In presenting the NPRM, the Commission acknowledged that the rulemaking would consider substantially different and new interpretations of the Act; see, *e.g.*, 69 Fed. Reg. at 11738; indeed, in all, the NPRM posed no fewer than 185 questions about how the Commission should interpret the law and revise the regulatory standards.

As the OGC's May 11, 2004 Memorandum to the Commission (Agenda Doc. No. 04-48) has since emphasized, this was a "far reaching rulemaking," *id.* at 4, that would have altered the legal firmament for affected non-connected committees:

> The NPRM presents a number of alternative proposals. Generally speaking, the proposals would change the definitions of three foundational terms—"political committee," "expenditure," and "contribution" – with some proposals applying the new definitions of "expenditure" and "contribution" only to the determination of political committee status, and other proposals applying these two new definitions whenever the terms appear in the Commission's regulations. The NPRM also proposes to codify *Buckley's* "major purpose" test, and presents a number of alternative meanings for the test. The specific amendments in the NPRM are substantially interrelated—a Commission decision with respect to one rule will affect the scope and operation of the other rules, as well as other current regulations implementing the Act. Additionally, the NPRM proposes various alternatives for changing the allocation regime applicable to non-connected committees and separate segregated funds.

Id. at 2-3.

Of course, the NPRM elicited an unprecedented volume of comments from organized groups and individual citizens, including tremendous opposition from established tax-exempt

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[5] ACT preserves and respectfully incorporates the arguments it has presented to the Commission during the ongoing "Political Committee Status" rulemaking that the Commission lacks statutory authority to impose this federal funds requirement by any means. See generally Comments of America Coming Together, pp. 2-25 (April 5, 2004).

political, civic, charitable and advocacy organizations spanning the political spectrum. It is fair to say that those comments were grounded in principled concerns that the NPRM suggested rules that fell beyond the Commission's authority to promulgate, lacked sound policy justification, and unfairly and disruptively would change established standards during the final, peak period of a presidential election cycle.

In the wake of those comments and the April 14-15 public hearings, the OGC acknowledged the divergent views—which it urged the Commission not to try to resolve with "hasty action," *id.* at 11—concerning the Commission's authority without new legislation to take the unprecedented legal positions reflected in the NPRM. See *id.* at 5-8. And, the Commission, in three votes on May 13, refused to adopt any version of that proposal or to codify any aspect of AO 2003-37.

In light of the substantial and, in our view, well-grounded doubts about the legal theories in the NPRM and in AO 2003-37--several of which underlie the instant complaint—that have been expressed both by several Commissioners and a great many in the regulated community, the Commission should not use an enforcement proceeding to adopt and enforce new legal principles. Rather, if the Commission, either 90 days from its May 13 public meeting or at some other point, does adopt revised allocation regulations, they could *prospectively* alter how ACT must operate, and ACT's allocations from that point forward could be measured against them.

But in any event, the Commission should not depart mid-cycle from its longstanding approach to allocation. The allocation regulations require that calculations be developed and finalized on an election-cycle basis. See 11 C.F.R. § 106.6(c)(1)-(2). When Part 106 was last substantially revised in March 1990, the Commission set its effective date for the following January 1 for that reason. Indeed, at the Commission's May 13 meeting, Commissioners Thomas and Toner explained that the allocation portions of their proposed rule could operate prospectively only, as (in Commissioner Toner's words) "no recalculation or recalibration of past activity would be required or appropriate." The General Counsel added at the meeting that any changes in the allocation regulations should require "consider[ation of] transitional rules" due to fairness and practicality concerns. And, the General Counsel stated that more time was needed to consider changing the allocation regulations because the Commission had not looked at them in 13 years, "political behavior has changed a lot since then," and the Commission needed to undertake an empirical study of actual practices. Of course, no such analysis preceded the adoption of AO 2003-37.

At the time the Commission issued AO 2003-37, ACT followed Part 106 (as it is written and has been traditionally applied) in undertaking its fundraising and spending and in estimating its allocation ratio. Thus, ACT's federal account was dedicated to express advocacy concerning federal candidates and contributions regulated by FECA; ACT's non-

federal account was dedicated to communications concerning non-federal candidates and non-federal contributions; and, the anticipated ratio of these respective federal and non-federal activities determined the allocation ratio for all of ACT's spending (other than fundraising expenses, which are governed by the funds-received formula, see 11 C.F.R. § 106.6(d))—just as the regulations permit.

AO 2003-37 introduced an abrupt and controversial reinterpretation of how an organization comprised of a federal political committee and a non-federal political organization must allocate its spending. There are substantial grounds to believe that this aspect of AO 2003-37 is legally erroneous and—except perhaps for the complainants (they don't say) and several "reform" organizations that nonetheless won't or can't explain the meaning of the phrase—there is a broad consensus that a non-party committee cannot know what "promote, support, attack or oppose" means. Even the NPRM itself offered no elaboration of this critical phrase. Indeed, Vice Chair Weintraub, who moved the adoption of AO 2003-37 in February, reported at the May 13 meeting that "[w]e discovered afterwards that nobody seemed to understand what we were doing with that. We created massive confusion" among those regulated. See also Testimony of Ellen L. Weintraub Before the Committee on House Administration at 8 (May 20, 2004) ("We just went through one exercise in hopelessly confusing the regulated community, when we issued the ABC advisory opinion..."); May 20 House Transcript at 12 ("[w]e had reams of testimony from members of the regulated community that they don't understand what it means. And I don't want to push forward any kind of regulation that is going to confuse the regulated community. People in the regulated community need to understand what the rules are so they can comply with them.") (comments of Vice Chair Weintraub).

In fact, as Commissioner Thomas acknowledged at the May 13 meeting, the Commission had "stumbled and fumbled a bit trying to define those terms when we were doing the soft money rulemaking and the electioneering communications rulemaking" in 2002. Indeed, the Commission made plain at that time that it was unable to provide regulatory guidance as to the scope of "promote, support, attack or oppose." See Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200-03 (Oct. 23, 2002).[6]

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[6] In that rulemaking, BCRA's sponsors themselves urged the Commission not to predicate any regulatory exceptions to the electioneering communications prescription on this phrase because, they stated, it was "subjective" and would "create[] uncertainty about whether a communication will be covered by the law." Detailed comments of BCRA Sponsors Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe and Senator James Jeffords at 8, 6 (August 23, 2002). www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.

In sum, as Commissioners have acknowledged, as many NPRM commenters advised, and as common sense tells us, whatever the Supreme Court meant in simply declaring this formulation to be comprehensible in the political party context, see *McConnell v. FEC*, 124 S. Ct. at 675 n.64, it is a very different matter for other organizations to comprehend and comply with it. And, the Commission has now declined to provide a regulatory underpinning for that aspect of AO 2003-37, let alone explain what it means. In any event, the complainants offer absolutely no evidence to suggest that ACT has failed to adhere to this formulation in its allocation of its expenses.

Accordingly, we urge the Commission to find no reason to believe that ACT has violated FECA with respect to its allocation between its federal and non-federal accounts.

II. The Complaint Provides No Reason to Believe That ACT has Engaged in Unlawful Coordination.

The complaint alleges that ACT has undertaken "illegal" coordination of its activities with the Kerry for President campaign "through current party officials and former employees." Complaint at 13.[7] While the complaint identifies numerous individuals and groups that it claims are part of the alleged illegal coordination efforts, with the exception of Jim Jordan (discussed below), it makes no effort to tie their current employment or activities to ACT. As a result, ACT's response to this portion of the complaint will address its relationship with Jim Jordan and the only other individuals described who are currently connected with ACT, Andrew Grossman and Minyon Moore. As set out in further detail below, none of these relationships creates any issue of coordination under the Commission's rules.

Before addressing specific individuals, however, it is important to underscore the complaint's fundamental flaw: it misstates the law with respect to the FEC's coordination standard and then alleges facts pertinent only to that false legal standard. Thus, rather than demonstrating how the individuals named have met the actual standard for coordination, the complaint instead makes a series of conclusory statements to the effect that merely by having been employed by a party committee or the Kerry campaign, the individual, *per se*, satisfies the coordination standard:

[7] The complaint also alleges that coordination has occurred as a result of numerous media buys. Because the complaint attributes media advertising to others and correctly does not allege that ACT has engaged in any media advertising, we do not address this allegation.

- Andrew Grossman: "...he helped devise the plans and strategies that Democratic party campaign officials are using to carry out Senate, House, and President election strategies this election cycle, *providing further evidence of coordination.*" Complaint at 32 (emphasis added).

- Jim Jordan: "As Kerry's campaign manager, up to six weeks before he began working with the illegal 527 committees, the plans or needs of the Kerry campaign that Jordan brings to the soft money organizations, *constitutes illegal coordination under the Act and results in an impermissible contribution to the Kerry campaign.*" Complaint at 30.

- Minyon Moore: "[D]uring the election cycle, [she] is both a Kerry campaign consultant and a member of ACT's executive committee. *It is implausible that she could avoid* 'using' or 'conveying' information she learned in one role from influencing her thinking and decisions in her other role." Complaint at 59 (emphasis added).

Although the complaint quotes portions of the FEC's regulations on coordination at 11 C.F.R. § 109.21, it does so selectively and does not adequately address the most relevant part of the regulatory standard. Thus, the complaint cites § 109.21(d)(5)(i) as support for the conclusion that coordination *per se* may be found where an individual was a former employee or agent of a candidate during the same election cycle. But this is only the first half of the "former employee" test, and both tests must be satisfied in order to find coordination. The complaint neglects to allege any evidence that the *second* half of the test, at § 109.21(d)(5)(ii), has been met. That portion of the regulation provides:

> (ii) That former employee or independent contract or *uses or conveys* to the person paying for the communication:
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> (A) Information about the clearly identified candidate's campaign plans, projects, activities, or needs or his or her opponent's campaign plans, projects, activities, or needs, or a political party committee's campaign plans, projects, activities, or needs, *and that information is material to the creation, production or distribution of the communication*; or
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> (B) Information used by the former employee or independent contractor in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, or his or her opponent or the opponent's authorized committee, or a political party committee, or an agent of any of the foregoing, *and that*

information is material to the creation, production or distribution of the communication.

(Emphasis added.) The Commission stated specifically in its Explanation and Justification to the coordination regulations that mere prior employment does not demonstrate coordination:

> The Commission notes that the final rule focuses only on the use or conveyance of information that is material to the subsequent communication and does not in any way prohibit or discourage the subsequent employment of those who have previously worked for a candidate's campaign or a political party committee.

Final Rules, "Reporting; Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 439 (January 3, 2003). The Commission also rejected any requirement for a "cooling off" period following candidate or party employment. *Id.* The complaint's failure to cite any evidence to support a finding under § 109.21(d)(5)(ii) is understandable: the complainants simply have no such evidence. Thus the conclusory statements in the complaint must fail as a matter of law.

Moreover, the Commission's regulations limit the application of the coordination rule to the use or conveyance of information that is *"material"* to a subsequent public communication; the mere acquisition of knowledge, no matter how material, is irrelevant if that knowledge is not both used or conveyed *and* material to a subsequent public communication: "for purposes of the final rule, the Commission is only concerned with whether the information is material to the communication, not to the services previously provided to the candidate." *Id.*

Given these standards, the complaint fails to demonstrate any reason to believe that there was any prohibited coordination by ACT with either the Kerry campaign or with any party committee. We now address specifically the three individuals highlighted in the coordination portions of the complaint.

Andrew Grossman

The complaint mentions Andrew Grossman in only two places.[8] The complaint involving Mr. Grossman is based solely on his former employment with the Democratic

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[8] The complaint erroneously states that Mr. Grossman "now works with Jim Jordan at Thunder Road for , ACT and " In fact, Mr. Grossman is an employee only of ACT.

Senatorial Campaign Committee ("DSCC"), a national party committee, and alleges that, as a result of this employment:

> Grossman... was an agent of federal campaigns and learned of the plans, needs, and strategies of the Democratic party and its candidates. In addition, he helped devise the plans and strategies that Democratic party campaign officials are using to carry out Senate, House and Presidential election strategies this election cycle....

Complaint at 32. See also *id.* at 60. Even if this information is true, the complaint assumes but does not provide any evidence that Mr. Grossman has used this information for ACT or even conveyed it to ACT, or that such information has been material to any public communication made by ACT. In fact, the complaint does not identify a single ACT communication that was allegedly "coordinated" via Mr. Grossman. The reason is clear: the complainants have no such evidence. And, in fact, at ACT Mr. Grossman has not used or conveyed information learned during his employment with the DSCC, let alone information that was material to any public communication made by ACT.

As is clear from the discussion above, the FEC's rules on coordination do not prohibit a former party employee from working for an organization like ACT. Rather, the rules provide that coordination occurs only where information from the former employment proves to be material to public communications by the current employer. Plainly, the mere fact of sequential employment during an election cycle is insufficient to support a determination of reason to believe unlawful coordination has occurred. If that fact alone were treated as sufficient, the Commission would ignore its own regulations and be obliged to conduct investigations whenever any party employee went to work for any entity that undertakes public communications. Accordingly, Mr. Grossman should be dismissed as a respondent to the complaint, and the complaint against ACT should be dismissed insofar as it is predicated on Mr. Grossman.

Jim Jordan

The complaint points to Jim Jordan's role as the primary evidence of ACT's coordination with the Kerry campaign. Mr. Jordan served as campaign manager for the Kerry campaign until November 9, 2003. He subsequently created his own consulting firm, Thunder Road Group, which was hired by ACT in mid-January, 2004 to provide communications and research services.

As with Mr. Grossman, the complaint offers only conclusory statements about the coordination standard that rely on the mere fact that Mr. Jordan was at one time an employee of the Kerry campaign. For example:

None of these allegations, even if true, describes coordination under Part 109. For, coordination arises only from a particular use in a public communication by a private entity of non-public information concerning a candidate or a party committee, *not* a candidate or party committee learning or using public or even non-public information about a private organization. See 11 C.F.R. § 109.21(d); 68 Fed. Reg. at 435 ("substantial discussion" must involve "an interactive exchange of views and information"); *id.* at 432 ("The Commission did not propose...that coordination could result where a payor [of a public communication] 'merely informs' a candidate or political party committee of its plans."). The complaint here offers only what the Commission's regulations do *not* consider coordination, and this simply cannot warrant a reason-to-believe determination.

Conclusion

For the reasons set forth above, respondents ACT, Ellen Malcolm and Andrew Grossman respectfully request that the complaint against them be dismissed.

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The complaint likewise alleges that ACT is unlawfully raising non-federal funds with fundraising appeals that refer to a federal candidate. Complaint at 48. But, again, the complaint omits the crucial fact that ACT's solicitations expressly state ACT's non-federal electoral goals as well; AO 2003-37, at 19-20, addressed only a purely federal fundraising appeal.

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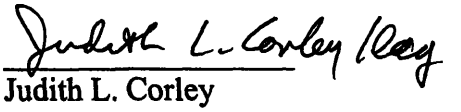
Yours truly,



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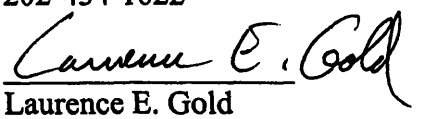

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